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Supreme Court, U.S.
FILED
NOV 13 1991
OFFICE OF THE CLERK

NO. 91-6382

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ORIGINAL

ROBERT WAYNE SAWYER,

Petitioner,

V.

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,
Angola, Louisiana,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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38 pp

QUESTIONS PRESENTED

1. What is the appropriate standard to be applied when determining whether the "'fundamental miscarriage of justice'" exception, Smith v. Murray, 477 U.S. 527 (1986), will allow for consideration of claims presented in a successor habeas corpus petition?

2. Under the standard to be used when determining whether the "'fundamental miscarriage of justice'" exception set forth Smith v. Murray, 477 U.S. 527 (1986), will allow for consideration of claims presented in a successor habeas corpus petition, should the focus be strictly on the defendant's legalistic "eligibility" to be sentenced to death, and fail to require a fact-based examination of the accuracy of the jury's decision, including whether: (i) the jury was presented with false facts; and (ii) the jury was not presented with true, mitigating facts?

TABLE OF CONTENTS

Questions Presented i

Table of Authorities iii

Opinions Below 1

Jurisdiction 2

Constitutional Provisions 2

Statement of the Case 3

A. Prior Proceedings 3

B. Facts Material to Innocence 6

Reasons for Granting the Writ 21

A. Introduction 21

B. The Conflict 23

Conclusion 32

TABLE OF AUTHORITIES

Cases

Arizona v. Rumsey, 467 U.S. 203 (1984) 28

Barclay v. Florida 463 U.S. 939 (1983) 26

Bullington v. Missouri, 451 U.S. 430 (1981) 28

Deutscher v. Whitley, 1991 WL 204454 (9th Cir. October 15, 1991) 23, 24, 29, 32

Dugger v. Adams, 489 U.S. 401 (1989) 21, 23-26, 30, 31

Jackson v. Virginia, 443 U.S. 307 (1979) 28

Johnson v. Singletary, 938 F.2d 1166 (11th Cir. 1991) (en banc) 23-25, 32

Kuhlmann v. Wilson, 477 U.S. 436 (1986) . . . 24, 26, 28, 29, 31

Lindsey v. King, 769 F.2d 1034 (5th Cir. 1985) 8

Lockett v. Ohio, 438 U.S. 586 (1979) 26

Lowenfield v. Phelps, 484 U.S. 231 (1988) 32

McCleskey v. Zant, ____ U.S. ____, 111 S.Ct. 1454 (1991) 5, 21, 28

Murray v. Carrier, 477 U.S. 478 (1986) 21

Poland v. Arizona, 476 U.S. 147 (1986) 28

Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988) 4, 6

Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989) 4

Sawyer v. Louisiana, 463 U.S. 1223 (1983) 3

Sawyer v. Maggio, 450 So.2d 355 (La. 1984) 3

Sawyer v. Maggio, 479 So.2d 360 (La. 1985) 3

Sawyer v. Smith, 110 S.Ct. 2822 (1990) 4, 9, 21

Sawyer v. Whitley, 567 So.2d 597 (La. 1990) 4

Sawyer v. Whitley, 572 So.2d 49 (La. 1990) 4

Selvage v. Lynaugh, 494 U.S. 108 (1990) 22

Selvage v. Lynaugh, No. 88-2278 (5th Cir.) 22

Smith v. Armontrout, 888 F.2d 545 (8th Cir. 1989) 25

Smith v. Murray, 477 U.S. 527 (1986) 21, 23-26, 28, 30

State v. Sawyer, 422 So.2d 95 (La. 1982) 3, 8

State v. Sawyer, 442 So.2d 1136 (La. 1983) 3

Stokes v. Armontrout, 893 F.2d 152 (8th Cir. 1989) . . . 23, 25

Zant v. Stephens 462 U.S. 862 (1983) 26

Statutes

La.C.Cr.P. art. 512 6

Rules

Supreme Court Rules, Rule 10.1(a) 22

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Petitioner, Robert Wayne Sawyer, is scheduled to be executed by the State of Louisiana on November 15, 1991, between the hours of midnight and 3:00 a.m. Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

CITATION TO OPINIONS BELOW

Mr. Sawyer seeks review of the circuit court's judgment dismissing his request for habeas corpus relief. Sawyer v. Whitley, No. 91-3658, slip op. (5th Cir. October 10, 1991). (App. 1). The circuit court affirmed the district court's judgment dismissing the petition for habeas corpus relief. Sawyer v. Whitley, No. 90-4035, slip op. (E.D. La. July 10, 1991).

All claims were exhausted in state court. The state trial

court denied post-conviction relief on October 5, 1990, and on December 10, 1990. The Louisiana Supreme Court denied Mr. Sawyer's applications for discretionary writs, without opinion. Sawyer v. Whitley, 567 So.2d 597 (La. October 7, 1990); Sawyer v. Whitley, 572 So.2d 49 (La. December 12, 1990).

JURISDICTION

The United States Court of Appeals for the Fifth Circuit dismissed Mr. Sawyer's petition for habeas corpus relief on October 10, 1991. On November 12, 1991, his Petition for Rehearing, Suggestion for Rehearing En Banc and Motion for Stay of Mandate and Stay of Execution Pending Application for Certiorari were denied. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1254 (1). The Court's authority to stay the scheduled execution is invoked pursuant to 28 U.S.C. secs. 2101 (f) and 2251.

CONSTITUTIONAL PROVISIONS

This petition involves the application of the Eighth and Fourteenth Amendments to the United States Constitution.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment, Section 1 provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Prior Proceedings

Mr. Sawyer was convicted of first degree murder and sentenced to death in the 24th Judicial District Court, Jefferson Parish, Louisiana on September 19, 1980. His conviction and sentence were affirmed on direct appeal. State v. Sawyer, 422 So.2d 95 (La. 1982). This Court vacated and remanded the case back to the Louisiana Supreme Court. Sawyer v. Louisiana, 463 U.S. 1223 (1983). On remand, the court again affirmed the conviction and sentence. State v. Sawyer, 442 So.2d 1136 (La. 1983).

Mr. Sawyer filed a state post-conviction petition, and appealed denial of relief. The Louisiana Supreme Court remanded the case to the state district court for a hearing on ineffective assistance of counsel "[i]n view of the fact that counsel assigned by the trial judge in this capital case was not admitted to the bar for at least five years prior to trial as required by La.C.Cr.P. Art. 512." Sawyer v. Maggio, 450 So.2d 355 (La. 1984). After an evidentiary hearing (where no evidence of prejudice was presented), the Louisiana Supreme Court, by a 4 to 3 vote, affirmed the trial court's denial of relief without a written opinion. Sawyer v. Maggio, 479 So.2d 360 (La. 1985).

Mr. Sawyer filed a writ of habeas corpus with the United States District Court for the Eastern District of Louisiana on

January 20, 1986. The district court denied the writ, without an evidentiary hearing, and a divided panel of the United States Court of Appeals for the Fifth Circuit affirmed the denial. Sawyer v. Butler, 848 F.2d 582 (5th Cir. 1988). The Fifth Circuit then granted rehearing en banc. By a vote of 9 to 5, the panel's opinion was affirmed. Sawyer v. Butler, 881 F.2d 1273 (5th Cir. 1989).

This Court granted certiorari on January 16, 1990. The Court, in a 5-4 opinion, affirmed Fifth Circuit's decision. Sawyer v. Smith, 110 S.Ct. 2822 (1990).

Petitioner filed a state post-conviction petition on October 3, 1990, which was denied on October 5, 1990. The Louisiana Supreme Court denied the application for discretionary writs without opinion on October 7, 1990. Sawyer v. Whitley, 567 So.2d 597 (La. 1990). Mr. Sawyer filed a second Petition for Writ of Habeas Corpus in the district court on October 8, 1990.[1]

Subsequently, Petitioner filed a state post-conviction petition on November 27, 1990 which was denied on the merits on December 10, 1990. Application for discretionary writs to the Louisiana Supreme Court resulted in denial on December 10, 1990, without opinion. Sawyer v. Whitley, 572 So.2d 49 (La. 1990). The exhausted claim raised was filed in the district court in Mr. Sawyer's First Supplemental and Amended Petition.

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[1] Mr. Sawyer's Application for Stay of Execution, filed with the habeas petition, was deemed moot after Governor Roemer, granted Mr. Sawyer a 30-day reprieve.

On December 12, 1990, the district court granted Mr. Sawyer's Application for Stay of Execution and ordered an evidentiary hearing "on all issues raised in the pleadings currently before the Court, including abuse of the Writ." Subsequently, in a minute entry dated December 18, 1990, the district court revised its order regarding the scope of the evidentiary hearing, limiting it to Claim 4 of the habeas petition: petitioner's allegations regarding design defects in Louisiana's electric chair.[2]

On July 17, 1991, the district court dismissed Mr. Sawyer's petition for habeas relief and later denied Mr. Sawyer's Application for Certificate of Probable Cause.

On August 16, 1991, the Fifth Circuit Court of Appeals granted Mr. Sawyer's Application for Certificate of Probable Cause and stayed Mr. Sawyer's execution based on "the 'actual innocence of death' exception to the cause and prejudice requirement imposed by McCleskey v. Zant, ____ U.S. ____, 111 S.Ct. 1454 (1991), that has not been addressed before in this circuit." After expedited briefing and oral argument, the circuit court denied habeas relief in an October 10, 1991 opinion. On November 12, 1991, the court denied Mr. Sawyer's Petition for Rehearing, Suggestion for Rehearing En Banc, and Motion for Stay of Execution Pending Resolution of Petition for Rehearing and Suggestion for Rehearing En Banc And Motion for

[2] The claim is now moot. As of September 15, 1991, lethal injection is the method of execution in Louisiana.

Stay of Mandate and Stay of Execution Pending Application for Certiorari.

B. Facts Material to Innocence

1. Introduction[3]

Mr. Sawyer's conviction and sentence of death are founded on lies. The state hid exculpatory evidence, failed to reveal that its star witness had been promised immunity in exchange for her testimony, and knowingly offered false evidence at trial. In addition, the sentence of death is premised on false and misleading evidence presented by an incompetent and inexperienced trial attorney.[4]

2. The Undisclosed Immunity Agreement

At trial, Cynthia Shano was the only witness who testified to the events leading up to Arwood's death. She was present at the scene of the crime, her own home. The state bought Shano's testimony with a promise of immunity and failed to reveal the deal to defense counsel. Just over a year ago, present counsel discovered that "the prosecutor wanted to charge [Shano] with the crime, but that she made a deal that if she would testify against

[3] All allegations of fact in this application were proffered with supporting documents and affidavits in the Petition for Habeas Corpus filed in October, 1990, and the Supplemental Petitions filed after that date. All appendices (App.) references refer to the petition.

[4] Contrary to state law, which requires that capital defendants be represented by attorneys with at least five years' membership in the bar, Mr. Sawyer was represented at trial by an attorney who had become a member of the bar less than two years prior to trial. Sawyer v. Butler, 848 F.2d at 586 (citing La.C.Cr.P. art. 512).

both [Charles Lane and Robert Sawyer] she would not be prosecuted." A friend has confirmed that Shano "has explained that she did not get in trouble for what happened because she turned state's evidence." Shano's now-deceased sister, a state witness at trial, told her husband that "Cynthia Shano made a deal to testify against the two men in exchange for not being arrested for the crime." The sister told her husband that she was present when Shano met with the assistant district attorney and discussed the deal.

3. The Uundisclosed Perjury

Shano lied on the witness stand and the prosecutor was fully cognizant that testimony he elicited was untruthful. In response to the prosecutor's questioning on direct, Shano testified that she was not drinking at the time the crime occurred; police had informed the prosecutor that they detected an odor of alcohol immediately following the crime. Defense counsel was not informed of this fact. In answer to lengthy questioning by the prosecutor, Shano also testified to her great love of her children. Yet prior to the commission of the crime and following it, the state was monitoring Shano for abuse and neglect of those well-loved children (a fact known to the prosecutor).

4. The Undisclosed Eyewitness' Statement And Physical Evidence

The only evidence implicating Mr. Sawyer in the commission of the murder was Shano's testimony and Mr. Sawyer's print, among other unidentifiable prints, on a can of lighter fluid found at

the scene. The state concealed evidence that would have destroyed the credibility of every aspect of its first degree murder case against Mr. Sawyer: an exculpatory eyewitness statement to police[5] and a second can of lighter fluid found on the scene of the crime.

Shano's four year old son, Wayne, witnessed the crime and knew that Mr. Sawyer was not involved in burning the victim.[6] On the day following the crime, Wayne told police that Mr. Sawyer had not set the victim on fire, that it was "the other man who had done it." He told police that in fact Mr. Sawyer "tried to help the lady," but that Sawyer's effort at preventing the arson was met with physical violence when "the man had slapped Bobby [Sawyer] back" and "Bobby fell back into the chair." (App. 6, Affidavit of Diane Thibodeaux, at 3).

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[5] Philip Boudousque, the prosecutor at trial, illegally withheld a crucial eyewitness statement in another capital case, then lied to conceal its existence. The case was tried within three months of Mr. Sawyer's case. In Lindsey v. King, 769 F.2d 1034 (5th Cir. 1985), Boudousque informed defense counsel, in pretrial discovery, that an eyewitness had identified Lindsey as the perpetrator. Id., at 1037. The actual statement by the witness was recorded in a police report which Boudousque withheld from defense prior to trial. The witness told police that "he did not see the perpetrator's face" and that viewing photographs "would be useless because he did not see the perpetrator's face." Id., at 1036 (emphasis added). The 5th Circuit panel was outraged by Boudousque's misconduct and deceit and reversed the conviction stating, "[s]uch conduct would be reprehensible in an ordinary case; where a man's life is at stake, it is beyond reprehension." Id., at 1040 (emphasis added).

[6] Mr. Sawyer's conviction for first degree murder is premised upon finding aggravated arson. Aggravated arson was found as an aggravating circumstance by the jury in sentencing phase. Sawyer v. State, 422 So.2d at 99 n. 8.

Wayne also told police how the victim was set on fire. He said that the other man poured lighter fluid from a can into the "shiny thing you put cigarettes in" and then on the victim. Then he showed police where the evidence of the arson was located: in the trash. Police went through the trash and discovered the bottom half of a cigarette holder and a second can of lighter fluid. (App. 6, at 3). Neither Wayne's statement exculpating Mr. Sawyer from participation in aggravated arson nor the existence of a second can of lighter fluid were revealed to Mr. Sawyer at trial.

5. Unpresented Compelling Mitigating Circumstances

Defense counsel's incompetence during the penalty phase equaled, if not surpassed, the state's deceit in withholding crucial exculpatory evidence. Mr. Sawyer has multiple, crippling disabilities that render him incapable of understanding complex situations in anything but the most concrete terms and which severely compromise his ability to control violent reactions to complex emotional situations.[7] The probable etiology of Mr. Sawyer's impairments is the unrelenting and violent abuse he and his mother received at the hands of his sadistic father and tormented mother.

Trial counsel abdicated his role as advocate in the sentencing phase of Mr. Sawyer's trial; he failed to investigate

[7] This Court previously commented that Mr. Sawyer committed acts of violence against the victim "for reasons that are not clear." Sawyer v. Butler, 110 S.Ct. at 2825. The reasons are now quite clear.

and present a documented history of organic brain damage and mental retardation, including four prior mental health commitments, and failed to discover and interview easily accessible relatives who could give heart-wrenching testimony as to the cruelty and violence that pervaded Robert Sawyer's childhood home. Instead, trial counsel relied upon a state psychiatrist who diagnosed Robert as a sociopath after a 20 minute interview, without the benefit of a medical or mental health history and without ruling out organic brain damage. Effective representation would have revealed the following:

i. **Early Childhood: Abandonment, Abuse, and Neglect**

Robert Wayne Sawyer was born on October 8, 1950 in Memphis, Tennessee to a sick mother, Betty, and a sadistic father, Robert Sr.[8] His mother gave birth to twins, Robert Wayne and Betty Jane. The three returned from the hospital to the family's crowded, dilapidated two room shack in rural Tennessee where Mr. Sawyer grew up. The house had no electricity, no running water, not even an outhouse. At the time seven family members shared the two rooms: Mr. Sawyer, his father and mother, his grandmother and grandfather, and his sisters Glenda Sue, age four, and Betty Jane.

Mr. Sawyer's mother, Betty, had been constantly ill and bedridden during the nine months of her pregnancy, suffering from

[8] Family member refer to the father as "Robert" and to Mr. Sawyer as "Robert Wayne." They appear as such in quoted affidavits. Otherwise, they will be referred to as "Sawyer, Sr." and "Mr. Sawyer," respectively.

Asian flu and uremic poisoning. Not long after returning home from the hospital, she became more and more depressed and withdrawn. She twice tried to kill her newborn son, once with a fire poker and once by suffocation. Less than four months after giving birth, Betty Sawyer committed suicide leaving her sadistic husband in charge of the infants.

Family members were readily available to testify to the torture and abuse visited upon Mr. Sawyer and his mother at the hands of his father. They were never contacted by trial counsel. They state in their affidavits that the father beat, raped, and "treated [Ms. Sawyer] like a dog," (App. 8), "as if he hated her." (App. 7). Three months after Mr. Sawyer's birth, his mother "went outside and sat in the back seat of the family car. She propped the shotgun up against the front seat, aimed it at her heart, and pulled the trigger with her toe. She died immediately." (App. 8) Sawyer Sr.'s "overbearing personality, hatefulness, and abuse destroyed [Betty's] spirit and her will to live." (App. 10).

Sawyer, Sr.'s treatment of his first wife was consistent with his treatment of others when he was growing up. Again and again, relatives describe a cruel, hateful, and violent man. Most were afraid of him and "tried to stay away from him" as much as possible. (App. 10). Sawyer, Sr. took sadistic pleasure in abusing others and "was only happy when other people were miserable." (App. 7). He "seemed to take pleasure in physically hurting his sisters," (App. 10), and, according to one sister

would "get my sister and me alone and terrorize us then laugh about it." (App. 8).

Sawyer Sr. "grew up believing he could do anything he wanted to other people and get away with it." (App. 8). The end result was disastrous, particularly for the women and children that bore the brunt of Robert's rage:

> Ever since I have known Robert Sawyer, Robert Wayne's father, he has been mean and abusive to everyone he comes in contact with. He has never had a kind word or feeling for anybody. All his life, he has bullied and beaten his family from his son Robert Wayne to his second wife, Mott and his grandson Scotty. Robert always demanded that things be exactly the way he said and that no one do anything that he didn't say was okay.... He was just that kind of man who always had to prove that his word was law.

(App. 9).

Following his wife's suicide, Sawyer, Sr. undertook proving his word was law to "the only thing in the world that was his and that he could do anything he wanted with" -- his son, Mr. Sawyer. Mr. Sawyer's twin sister, Betty Jane, mercifully escaped the same fate. Her aunt, Virginia Kimberlin, took her in and raised her, leaving Robert Wayne to a fate that changed the course of his life. She remembers

> little Robert Wayne seemed to bear the full weight of his father's anger and frustration. Robert worked him in the fields and clearing land like he was a grown-up. Nothing Robert Wayne could ever do was right according to his father. From third grade on, he was in special education classes and his father made fun of him and called him names for that. Robert also called that poor child things I wouldn't repeat. He would beat him with anything he could get his hands on. I remember once, after Robert Wayne had been horse whipped by his father, I told him something about not treating that boy so bad and he told me that Robert Wayne was the only thing in the world that was his and that he could

do anything he wanted with.

(App. 8).

As a small child, "Robert Wayne was beaten, taunted, humiliated, and rejected by his father." (App. 6). In addition to beating his son, the father "wouldn't let [Mr. Sawyer] go places and do things with the other boys. When other cousins would visit the house, Robert Wayne was ordered to work, usually doing meaningless chores, so he was never allowed to play with them." (App. 8). But the chores were not only meaningless ones, designed to prevent Mr. Sawyer from playing with other children. The father also forced his son to do difficult work, and cursed and beat him "at the drop of a hat" when the child failed to fulfill his father's impossible demands.

> As soon as Robert Wayne was old enough to walk and talk, his father had him doing chores all day long. By the time he was eight years old or so, he was having to do things like clearing land, really men's work. Robert treated his son like a slave with never a kind word or show of any love or affection. My husband would always say how he could hear Robert cursing Robert Wayne all the way across the road.

(App. 7).

Sawyer Sr.'s abuse of his son had a lasting effect, which became apparent as Mr. Sawyer grew into a teenager. The abuse is the likely etiology of organic damage to the prefrontal lobe of Robert Wayne's brain. As one aunt so aptly summarized:

> Robert Sawyer destroyed his wife's life and if that wasn't enough, he destroyed his son's too. I believe if Robert Wayne had gotten the care and love and attention he needed when he was a child, he wouldn't be where he is today.

(App. 6).

ii. Mental Retardation and Neurological Damage

Mr. Sawyer is mentally retarded with an IQ of 68. He never progressed beyond the third or fourth grade level in school. The etiology of his learning difficulties is unclear, but mental retardation exacerbated by neurological impairment resulted in a "severely impaired ability to perform abstract thinking, to make generalizations or to understand abstract concepts." (App. 1).

After failing first grade twice, Mr. Sawyer was "socially promoted" to the second grade, where he received five "F"s and three "D"s. After three full years in school, he scored at a zero level in reading, math, and spelling. He was then placed in an Educable Mentally Retarded class and remained there until he dropped out of school. By the time Mr. Sawyer reached his eighth year in school, at age 14, his teacher reported that his social progress was "poor" and that he "has developed an attitude that the world is against him, however I believe this is due to his home environment." In his last year in school in Millington, he was reading and spelling at a fourth grade level and his arithmetic performance was consistent with a third grade level. (App. 5).

By the time Mr. Sawyer was a teenager, his ability to control his impulses was impaired by severe brain damage and aggravated by Schizophrenia. At age 14, Mr. Sawyer began his first of a series of mental health treatments. In February, 1965, he was referred to the Gailor Mental Health Clinic in

Memphis where the diagnosis was: "moderately retarded, chronic brain syndrome manifested by moderate retardation and abnormal EEG." At that time, he was prescribed Prolixin, an anti-psychotic medication, and Dilantin, anti-seizure medication. (App. 4)

His thought process and his neurological impairments began to worsen, and Mr. Sawyer was placed in the psychiatric unit of the John Gaston Hospital in Memphis on June 17, 1966. He was prescribed Thorazine, a powerful psychotropic medication for the treatment of Schizophrenia and psychosis. He was discharged from this facility on June 24, 1966. The final diagnosis was similar to the findings made at the Gailor Clinic: "Chronic Brain Syndrome with unknown cause manifested by mild mental retardation and abnormal EEG with behavioral disturbances." (App. 4).

On August 16, 1966, at age 15, Mr. Sawyer was adjudicated incompetent and committed to the Western State Psychiatric Hospital in Bolivar, Tennessee. (App. 4). During his commitment, Mr. Sawyer underwent shock treatments and was prescribed anti-psychotic medication and tranquilizers. The records indicate that he was provisionally diagnosed as "mental deficiency, idiopathic, mild, with psychotic reaction". Mellaril and phenobarbital were prescribed. It was reported that he exhibited "childish behavior and lack of responsibility," and his privileges were curtailed when "he began to annoy the girls on the hospital grounds." He was then administered "E.C.T.s as well as tranquilizing drugs with little improvement in his mental

attitude." (App. 4).

The psychiatric records show "[e]motional deterioration, inappropriate affect, childish behavior, grimacing and mannerisms noted...apperception [power of reasoning] poor, patient does not realize the degree of his psychogenic dissolution. Insight, judgment and reasoning defective." His final diagnosis added the disease which he had been medicated for the previous two years -- "Schizophrenic reaction, childhood type." Upon discharge, Mr. Sawyer's psychiatrist noted the following: "stress: severe; predisposition: severe; impairment: severe, apparently this patient failed to identify himself with parents and siblings and lack of ego strength and ego ideal is the dynamic cause of the patient's illness; Prognosis: guarded." On January 10, 1967, Robert was once again found to be "not competent to conduct his own affairs." Yet he was discharged from the hospital. (App. 4).

Last year, Mr. Sawyer was competently evaluated by a neurologist, a psychiatrist, and a psychologist. The results show severe brain damage in the prefrontal areas and mild to moderate mental retardation. As the evaluators explain, unless he is in structured, supervised environments, Mr. Sawyer has difficulty controlling aggression. He also does not understand the consequences of it. He cannot comprehend abstract concepts and is incapable of making well-reasoned decisions. In other words, the same problems reported in his records from teenage mental health hospitalizations still existed at the time of the

murder, and the trial, and to this day.

Dr. Alec Whyte, an eminently qualified practitioner and professor of psychiatry, has diagnosed Mr. Sawyer as suffering from Organic Personality Syndrome secondary to frontal lobe brain damage and mild mental retardation. He made his diagnosis after careful review of school records, psychiatric records, summaries of social history, and an interview lasting 2 hours and 45 minutes.

Dr. Whyte found that Organic Personality Syndrome (formerly Organic Brain Syndrome) as described in the diagnostic manual of the American Psychiatric Association (DSM III-R) "reads like a veritable summary of the life history of Robert Sawyer."

> The clinical syndrome in a particular person depends principally on the nature and localization (in the brain) of the pathological process. A common pattern is characterized by affective instability and impairment in impulse control or social judgment. The individual may be belligerent or have temper outbursts that are grossly out of proportion to any precipitating psychosocial stressor. Socially inappropriate actions, such as sexual indiscretions, may be engaged in with little concern for the consequences. Another pattern is characterized by marked apathy and indifference. Both of these patterns may be associated with damage to the frontal lobes, and for this reason are sometimes referred to as 'frontal lobe syndromes'...The major personality change may be the development of suspiciousness or paranoid ideation....Mild cognitive impairment and irritability may be present....The degree of impairment is variable. Despite relatively intact cognitive function, poor judgment may lead to such difficulties that the person may require constant supervision or even custodial care....Socially unacceptable behavior may lead to social ostracism or legal difficulties. Impulsive or explosive behavior may be dangerous to the individual and to others....Organic Personality Syndrome is usually due to structural damage to the brain. The most common causes are neoplasms (for example, meningiomas pressing on the frontal lobes, head trauma (including the post-

concussion syndrome), and vascular disease."

(App. 1).

Dr. Brad Fisher, Ph.D., a specialist in forensic clinical psychology who wrote his dissertation on the prediction of dangerous behavior, reviewed the records, interviewed Mr. Sawyer, and administered a series of neuropsychological tests. The testing revealed "considerable indicators of both neurological dysfunction (brain damage) and a mild level of mental retardation." Dr. Fisher concluded that:

> the[] findings of neurological dysfunction may well be related to connected behavioral dysfunction, including the possibility of poor judgment under stress and impulsive acting out behaviors, especially at those times. Indicators of brain damage in clients reporting uncontrollable violent rage behavior are often indicative of possible frontal lobe dysfunction.

(App. 2).

Dr. Orrin Devinsky, Chief of the Department of Neurology at the Hospital for Joint Diseases of New York University and Associate Professor of Neurology, also reviewed school records, records of mental health treatment in City of Memphis Hospital and Western Mental Health Institute, and other available medical records. He then obtained a history and performed a neurological examination. The results of the neurological examination indicated "global cognitive impairment and specifically point[ed] to evidence of prefrontal dysfunction." , (App. 2).

Further, more sophisticated testing, by way of Magnetic Resonance Imaging (MRI), revealed "a small punctate focus of increased proton density in the subcortical white matter of the

medial left frontal lobe." In reporting the results of the MRI, Dr. Devinsky concluded:

> As I stated in my original report the type of neurological deficits Mr. Sawyer has are characteristic of frontal lobe injury. The MRI provides supporting evidence that he has brain damage. These abnormalities are a marker for other brain abnormalities that are at a microscopic or functional level, and severely compromise his intellectual, emotional and behavioral functions.

In reaching their conclusions and explaining them, all three doctors mention early evidence of retardation, severe head injuries (with loss of consciousness), Mr. Sawyer's violent home environment, his early manifestation of behavioral disturbances (hyper-aggressive and hyper-sexual impulses) resulting in hospitalization, and the excessive drinking which began about a year before he committed murder.

Each doctor explains the relevance of Mr. Sawyer's neurological dysfunction to the murder and subsequent legal proceedings:

> Behavioral Symptoms. The impulsive aspect of Robert Sawyer's behavior in response to emotional interpersonal situations or to his own aggressive and/or sexual mood occurs with minimal, if any, intellectual reflection. Any experiences such as moral culpability, consideration for others involved or any understanding of the generalized significance of his behavior is lacking, regardless of outward appearances. His behavior in response to emotional signals is akin to a reflex arc having perhaps ritualistic but not truly rational significance.
>
> Cognitive Symptoms. Robert Sawyer's deficit in using or comprehending abstract words and symbols severely limits his capacity to understand general legal concepts and their particular applicability. Therefore, dialogue with counsel regarding defense strategies, plea bargaining, etc., could not be understood beyond some limited, concrete sign value

> which he would describe. For example, he insisted during my interview that "evidence" was "something lawyers used against you." When asked if evidence could be used in one's behalf, he answered, "No, only against you." When asked to define evidence, he said, "It's what lawyers put on a yellow pad like the one you're using." No more adequate definition could be elicited.

(App. 1).

> At the time the crime was committed, Mr. Sawyer's brain damage, specifically in the prefrontal areas, impaired his ability to control aggression and to comprehend the consequences of his actions. A long night of heavy drinking immediately preceding the murder intensified the neurologic impairment. Mr. Sawyer reacted violently and inappropriately when confronted with what he believed to be evidence that two young children had been drugged. Uninhibited, his aggressive impulses dominated his behavior for a period of time during which he could not comprehend that the increasingly destructive physical abuse of the victim would lead to her death. Brain damage, aggravated by intoxication, impaired his capacity both to appreciate the criminality of his conduct and to conform his conduct to the requirements of law.

(App. 2).

> When these handicaps [neurological dysfunction and mental retardation related to connected behavioral dysfunction] are combined with the self administration of massive amounts of alcohol, it is probable that whatever neurological deficits are present will be exacerbated at the time of the crime because of the data suggesting large levels of alcohol ingestion without nutrition, and consequently may have resulted in a psychotic breakdown at that point (i.e., not a chronic condition, but one caused by the combination of neurological handicap and alcohol ingestion without nutrition). Psychosis can best be explained in this context as a condition where a person is not in touch with reality and may have severe limits in cognitive and judgmental functions such as the ability to differentiate between right and wrong.

(App. 3).

Mr. Sawyer's multiple impairments, resulting from his cruel treatment as an innocent child, paint a picture of human frailty and deprivation which in turn casts a different light upon what have been repeatedly described as an inexplicable acts of brutality. See, e.g., Sawyer v. Smith, 110 S.Ct. 2822, 2825 (1990) ("brutalities" committed "for reasons that are not clear"). Mr. Sawyer's jury was stripped of its ability to make an accurate decision as to the appropriate sentence in his case when trial counsel failed to conduct the most rudimentary investigation of readily accessible evidence which would have mitigated against death.

REASONS FOR GRANTING THE WRIT

A. Introduction

In Smith v. Murray, 477 U.S. 527 (1986), the Court extended to the sentencing phase of a capital trial the "fundamental miscarriage of justice" exception to cause and prejudice doctrine set forth in Murray v. Carrier, 477 U.S. 478 (1986). Stating, "that the concept of 'actual,' as distinct from 'legal,' innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense," id. at 537-38, the Court declined to address the question of what constitutes a miscarriage of justice in that context. In Dugger v. Adams, 489 U.S. 401 (1989), and, again in

McCleskey v. Zant, ___ U.S. ___, 111 S.Ct. 1454 (1991),[9] the Court refused to resolve the question. The result of the Court's refusal has been confusion and conflict -- four lower courts have provided four different answers most of which are unfaithful to this Court's indications of what the proper application of a miscarriage of justice in the sentencing context should be. The question has gone unanswered long enough. The conflict needs to be resolved now because the lower courts are in desperate need of this Court's guidance. See, Supreme Court Rules, Rule 10.1(a).

It cannot be denied that the proper application of the "innocence of death" standard is of exceptional importance. Many cases currently pending in the lower courts, and many cases to follow,[10] may turn on the resolution of the differing standards of the four circuits and the soon-to-be-developed standards in the other circuits.

Further, this compelling case must be reviewed. It is the

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[9] On October 10, 1989, this Court granted certiorari in Selvage v. Lynaugh, 494 U.S. 108 (1990) limited to the following question:

> At the time petitioner was tried, was there "cause" for not raising a claim based upon arguments later accepted in Penry v. Lynaugh, 106 L.Ed.2d 256 (1989); and if not, would the application of a procedural bar to this claim result in a "'fundamental miscarriage of justice'" Smith v. Murray, 477 U.S. 527 (1986).

The Court remanded the case to the lower court to consider the first part of the question and did not reach the second part of the question. Id.

[10] For example, in Selvage v. Lynaugh, No. 88-2278 (5th Cir.) oral argument was held on October 1, 1991. A separate panel for Mr. Sawyer's is struggling with the issue of whether or not the eligibility test set forth in Sawyer v. Whitley, supra can be applied to Texas' sentencing scheme.

rare and exceptional case. The facts presented show that the state practiced a no-holds-barred prosecution violating the most fundamental fairness of a fact-finding process and several of Mr. Sawyer's constitutional guarantees. The reasons for Mr. Sawyer's involvement in the crime are now very clear and are directly linked to his organic brain damage, mental retardation and history of extreme physical and emotional abuse. The facts show that the jury would have voted life had (i) they known of the frailties of his life, including his four prior commitments to mental institutions, or (ii) had his young and inexperienced trial counsel performed effectively, competently and ethically. But for trial counsel's gross errors, Mr. Sawyer would not be before the Court today.

B. The Conflict

Since this Court's acknowledgment in Smith and Dugger that the miscarriage of justice exception applies to the penalty phase of a capital trial, the following cases have proposed standards: Deutscher v. Whitley, 1991 WL 204454 (9th Cir. October 15, 1991); Sawyer v. Whitley, supra; Johnson v. Singletary, 938 F.2d 1166 (11th Cir. 1991) (en banc); and Stokes v. Armontrout, 893 F.2d 152 (8th Cir. 1989). While Mr. Sawyer is the first litigant on this issue to request a ruling from this Court, two other litigants may be requesting certiorari review in the next two months. The Petitioner in Johnson v. Singletary, 938 F.2d 1166 (11th Cir. 1991) (en banc) is scheduled to file a certiorari

application on December 13, 1991.[11] The respondent in Deutscher v. Whitley, supra may file a certiorari application soon.[12]

As shown below, the Court has provided guidance to the lower courts in Smith, supra, Dugger, supra, and Kuhlmann v. Wilson, 477 U.S. 436 (1986), by articulating principles which assure fairness in the fact finding process. Those principles have been ignored by the Fifth and Eleventh Circuits, in articulating proposed standards for "innocence of death" exception, and have formed the basis for the Ninth Circuit proposed standard for the exception.

The latest pronouncement is Deutscher v. Whitley, 1991 WL 204454 (9th Cir. October 15, 1991). There, the court was faced with a claim in a successor petition strikingly similar to Mr. Sawyer's, that is, was trial counsel ineffective for failing to present compelling mitigating evidence of childhood abuse, organic brain damage, prior diagnosis of schizophrenia and commitments to mental institutions. Because the claim was

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[11] The Eleventh Circuit has stayed the mandate in Johnson, supra, until December 13, 1991 pending application for certiorari under Rule 41 of the Rules of the United States Court of Appeals for the Eleventh Circuit, which states, in part, "Ordinarily [a motion for a stay of the mandate] will be denied unless it shows that it is not frivolous, not filed merely for delay, and shows that a substantial question is to be presented to the Supreme Court...."

[12] The death-sentenced prisoner in Deutscher was granted relief on the same successor claim with strikingly similar facts. If Mr. Sawyer's case were in the Ninth Circuit he would not be before the Court today. Under an accuracy-seeking standard of review, Mr. Sawyer would have been granted relief. See, infra. It is inequitable and wholly unjust that these two cases have different results.

subject to abuse of the writ, the court noted that under the fundamental miscarriage of justice doctrine the writ must issue "if, as a consequence of the constitutional error, (1) the sentencing body never considered evidence critical to the exercise of its discretion and (2) it is more probable than not that the death penalty would not have been imposed had the evidence been considered." Id. at 3. Drawing on this Court's decisions in Dugger v. Adams, supra and Smith v. Murray, supra, and noting that the doctrine of abuse of the writ is "based on the principles of equity," the court outlined the appropriate standard as follows:

> To establish a fundamental miscarriage of justice at sentencing, a defendant must establish that constitutional error substantially undermined the accuracy of the capital sentencing determination.... This requires a showing that constitutional error infected the sentencing process to such a degree that it is more probable than not that, but for the constitutional error, the sentence of death would not have been imposed.

Id. at 3 (citation omitted) (the dissenting judge agreed that the standard is proper, while disagreeing with its application).

In Stokes, supra, the court held that the fundamental miscarriage of justice "exception will be available [for penalty phase claims] 'if the federal constitutional error alleged probably resulted in a verdict of death against one whom the jury would otherwise have sentenced to life imprisonment.'" Stokes v. Armontrout, 893 F.2d 152, 156 (8th Cir. 1990) (quoting Smith v. Armontrout, 888 F.2d 545 (8th Cir. 1989)).

Johnson, supra, produced three proposed standards with a

slim six member majority holding:

> The sentenced defendant must demonstrate not merely that the error affected the sentencing outcome, but that the error resulted in a sentencing outcome for which the defendant is not eligible by virtue of his conduct....That is, but for the alleged constitutional error, the sentencing body could not have found any aggravating factors and thus the petitioner was ineligible for the death penalty.[13] Id. at 1183 (emphasis in original).

The Johnson majority justified its eligibility standard on the ground that "a court lacks objective criteria by which to divine that it is 'factually incorrect' to sentence a particular death-eligible defendant to death or life instead. So long as the could have imposed the death penalty, there can be no 'correct' or 'incorrect' sentencing outcome." Id. at 1184. Under the Johnson view, a court is incapable of resolving claims of ineffective assistance of counsel at the sentencing phase.

Judge Anderson, joined by three other judges, argued vigorously in dissent that the majority's proposed standard "is inconsistent with the guidance" set forth by this Court. Drawing directly from Smith, Dugger, and Kuhlmann, the four dissenters

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[13] The court's eligibility test is premised on a faulty canvas of developments in the law since Furman v. Georgia, which led the majority to conclude that this Court has travelled a "jurisprudential circle." Id. at 1179. This characterization results from the court's reasoning that Furman held unconstitutional unlimited discretion in capital sentencing and Lockett v. Ohio, 438 U.S. 586 (1979) "did not merely tolerate discretion, but mandated it!" Id. at 1180. Next the court makes its most blatant leap in logic, stating "[t]he Court dropped the other shoe" in Barclay v. Florida 463 U.S. 939 (1983), and Zant v. Stephens 462 U.S. 862 (1983), by taking the law back to the pre-Furman era when it decided that juries have unfettered discretion to consider anything in aggravation. Id.

proposed a standard that is "reserved for the extraordinary case," Id. at 1199, and that tests the reliability and accuracy of the sentence. Under this standard absent a showing of cause and prejudice, abuse of the writ may be excused in a sentencing context "where the alleged constitutional error has resulted in a factually inaccurate sentencing profile, and the inaccuracies are so significant that the result would have been different." Id. at 1200. (emphasis in original). The test demands that the sentencing profile before the triers of fact was true and correct, and that but for the error, the outcome would have been different.

A third proposed test was outlined by Chief Judge Tjoflat, who also found the majority's proposed test to be "unfaithful" to this Court's precedent but for different reasons. Id. at 1187. While endorsing the "eligibility" concept, the Chief Judge proposed a test that takes into consideration federal and state law. Id. at 1191.

The Fifth Circuit's proposed test in this case ignores this Court's precedent, misapplies and misconstrues precedent, and is unable to correct fundamental miscarriages of justice. The panel's proposed test requires

> the petitioner to show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty. That is, a petitioner is not actually innocent of the death penalty unless he demonstrates, under all the evidence that was and arguable should have been presented, that the jury would not have been authorized to sentence him

to death.

Sawyer, slip op. at (emphasis added). The test is simply one of "eligibility," and in Louisiana and most other states, it means that the claim(s) in the successive petition must implicate the aggravating factor(s) found by the jury in the sentencing phase. The panel's decision does not take into consideration core principles of the eighth amendment and this Court's clear signals that accuracy, reliability, and appropriateness of the sentencing determination are fundamental. In announcing this test, the court misapplied Bullington v. Missouri,[14] 451 U.S. 430 (1981), and Jackson v. Virginia, 443 U.S. 307 (1979)[15]. The panel's opinion also ignores the clear implication of this Court's precedent that the "innocence of death" exception must be a separate and distinct standard from the "innocence of guilt" standard.

C. Accuracy, Not Eligibility, Must Provide the Basis For

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[14] The panel's statement that Smith is premised on Bullington's distinction between a death sentence and other sentences, at 13-14, completely misconstrues Bullington. "The 'case' to which the Court referred in Bullington was the prosecution's case that the defendant deserved the death penalty." Poland v. Arizona, 476 U.S. 147, 153 n.3 (1986). See also, Arizona v. Rumsey, 467 U.S. 203, 209 (1984).

[15] The panel's incorporation of Jackson's sufficiency of the evidence test is unfounded. This Court has never referred to Jackson as the "foundation of the Kuhlmann test." Sawyer, slip op. at 17. To the contrary, Jackson's sufficiency test focuses solely on the prosecution's case and is wholly inconsistent with the Kuhlmann and McCleskey mandate that a petitioner make a colorable showing of innocence by considering all probative evidence. Kuhlmann's standard inquires whether the trier of fact would have entertained a reasonable probability as to guilt, not whether elements of a crime or penalty could have been found beyond a reasonable doubt.

The Appropriate Standard.

The eligibility test will not allow courts to correct gross fundamental miscarriages of justice. Justice cannot be served by using this standard. As in this case, a petitioner can show that his counsel did absolutely nothing to prepare for the penalty phase, but merely parroted false information in a one page closing argument when he could have presented the compelling mitigation outlined above, the facts of the claim are ignored under the Fifth Circuit's proposed standard. Petitioners, like Mr. Sawyer, who can demonstrate a total breakdown of the integrity of the fact finding process will be ensnared in a procedural death trap. However, the petitioner in Deutscher was granted relief, a reversal of his death sentence, based upon counsel's failure to present mitigation evidence which is quite similar to Mr. Sawyer's. See, Deutscher, supra, 1991 WL 204454 at 3 (mitigating factors forming the basis of the court's opinion). The simple, and disturbing, fact is that under an equitable, accuracy-seeking standard, Mr. Sawyer would find himself in the same situation as Mr. Deutscher. If Mr. Sawyer's case was in the Eleventh Circuit, rather than the Fifth Circuit, he would not be under a sentence of death.

In Kuhlmann, supra, the Court ruled that lower courts must "entertain [successive] petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." Id. at 454. The petitioner must "show a fair probability in light of all [probative] evidence...[that]

the trier of fact would have entertained a reasonable doubt as to guilt." Id. at 454, n.17 (quotations and citations omitted).

In Smith, supra, the Court stated that the fundamental miscarriage of justice exception would apply where there is a "substantial claim that the alleged error undermined the accuracy of the...sentencing determination." Id. at 359. The question at issue was left unanswered because the erroneously admitted evidence (i) was not "false or in any way misleading", (ii) did not have the effect of "foreclosing meaningful exploration of psychiatric defenses," (iii) did not "preclude[] the development of true facts [or] result[] in the admission of false ones", or (iv) did not "serve to pervert the jury's deliberation concerning the ultimate question whether in fact petitioner constituted a continuing threat to society." Id. at 538.

In Dugger, supra, the Court again emphasized that the accuracy of the jury's verdict that death is the appropriate punishment is suspect when false evidence is admitted or accurate evidence is not admitted. At issue was whether the Caldwell error in that case asserted in a second habeas petition could be reviewed on the merits absent a showing of cause and prejudice. The dissent argued that "since 'the very essence of the sentencing determination has been unconstitutionally undermined,' the standard for showing a fundamental miscarriage of justice necessarily is satisfied." Id. at 417, n. 6. The majority rejected this overbroad application, stating, "Demonstrating that an error is by its nature the kind of error that might have

affected the accuracy of a death sentence" is not whether the error did in fact undermine the accuracy, or put another way, whether the petitioner can demonstrate whether he is actually innocent of the death sentence. Id. (emphasis in original).

This precedent makes clear that the exception is reserved for errors that actually undermine and destroy the fairness of the fact finding proceeding because the error prevents an accurate, reliable and individualized sentencing proceeding. It is the rare and extreme case, such as this one, where it can be shown that the error allowed for the presentation of false and misleading evidence and precluded the development of true and correct evidence which perverted the sentencers' decision.[16] The eligibility test does not comport with Kuhlmann's requirement that all probative evidence of the alleged claim be considered, with Smith's focus on whether the facts and the deliberations were perverted in order to determine whether the sentencing determination is accurate, or with Adams's admonition that the exception is limited to a showing that an error is fact-based and did in fact undermine the accuracy.

Further, the eligibility test is nothing more than the "colorable showing of factual innocence" of guilt set out in Kuhlmann. In Louisiana, eligibility for death is established in

[16] On November 12, 1991, Mr. Sawyer appeared before the Louisiana Board of Pardons and finally was able to have a forum consider his mitigation. By a 3-2 vote, the Board recommended a commutation sentence to life. The Governor of Louisiana must now except or reject the recommendation.

the guilt or innocence phase. Lowenfield v. Phelps, 484 U.S. 231 (1988). Implicating the "eligibility" factors necessarily implicates the guilt verdict. Applying the proposed standard means that once a person can show that the sole aggravating factor found at sentencing, for example, armed robbery, was untrue, his guilt of first degree murder must fall. See, Lowenfield, supra.

The Ninth Circuit has issued the only standard that can, correct fundamental miscarriages of justice and is consistent with this Court's precedent. In the wake of Deutscher v. Whitley, supra, the State of Nevada may very well petition this Court shortly, as may Mr. Johnson of Johnson v. Singletary, supra. Justice will not be served by allowing Mr. Sawyer's case to pass through this Court unanswered when it is clear that the sentencing determination would have been different had the errors not occurred. This is the extraordinary case demanding review of an exceptionally important question.

CONCLUSION

Petitioner, Robert Wayne Sawyer, respectfully requests that this Court grant the writ of certiorari.

Respectfully submitted:

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